No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus National Federation of Independent Business ("NFIB"), founded in 1943, is the nation's leading small business association, representing

[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

350,000 member businesses in Washington, D.C., and in all fifty state capitals. NFIB's membership spans the spectrum of small business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB member employs approximately ten people and reports gross sales of roughly $500,000 per year.

As a nonpartisan organization, NFIB's mission is to promote and protect the interests of its members in owning and operating their various businesses in the legal, regulatory, and institutional environments that are most consistent with success in their various endeavors and with the opportunity to choose how best to operate their disparate business enterprises. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and advocacy for small businesses.

In its role as an advocate for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases that will affect small businesses, including cases raising issues respecting the operation and cost of government (which affects small businesses both directly and indirectly) and the scope and allocation of individual rights and responsibilities. This case presents questions that are of substantial importance to the small business community and implicate several of amicus's long-standing interests.

SUMMARY OF ARGUMENT

This case presents a central issue of freedom of speech. It asks, first and foremost, if government can grant private entities authority over individuals under "agency shop" arrangements that promote a set of messages representing one viewpoint on subjects of intense political controversy, that increase political power for groups (and for candidates) sympathetic to those messages, and that require (as a condition of employment) support from individuals who oppose those messages.

Such exercises of government power run headlong into concerns that animate the First Amendment. *See, e.g.*, Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. Rev. 1405, 1443–47 (1987) (*Perils*). The fact that the individuals forced to contribute their support to the messages favored by the agency shop arrangements are government employees does not eliminate the problems. Granting government officials the power implicit in agency shop arrangements of the sort approved in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (*Abood*) expands the discretion of government to control private speech in ways that cannot be reconciled with the First Amendment's protection of the freedom of speech.

Although when the government acts in its capacity as an employer it enjoys latitude to both command and forbid speech, even then it cannot violate core First Amendment protections. Government generally cannot impose limitations on speech that are unrelated to the performance of the employment tasks. It cannot, for instance, tell public school teachers that outside of class they must speak in favor of certain

views or give money to support speech in favor of those views or that they are prohibited from speaking or supporting other views. See, e.g., *Pickering v. Board of Ed. of Township High School Dist. 205, Will City*, 391 U.S. 563 (1968) (*Pickering*). That is most clear on matters that lie at the heart of freedom of speech protections—speech concerning core political issues. See, e.g., *Pickering, supra*, 391 U.S. at 573-74.

Government constraints respecting core political speech bear a heavy burden of justification, and viewpoint-related constraints require the highest level of justification. See, e.g., *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) (*Citizens United*); *New York Times v. Sullivan*, 376 U.S. 254 (1964). Such constraints—including those that effectively place limitations on some viewpoints without expressly saying so—must serve a compelling state interest that cannot be achieved through a significantly less speech-restrictive means. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Cohen v. California*, 403 U.S. 15 (1971).

While even this heavy burden can be satisfied in some settings, the dynamic set up by creation of agency shops with exclusive union representation—and especially with compelled support for the positions taken by the union respecting issues such as the size and composition of public workforces and the pay for public employees—does not meet that test. The agency shop in government employment imposes burdens on speech that are predictably one-sided, that favor some political views over others, and that are not necessary to serve compelling state interests. See *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (*Harris*); *Knox v. Service Employees Int'l Union*, 132 S. Ct. 2277 (2012) (*Knox*). The use of agency shops in government also risks

tilting political contests—not merely speech about political subjects—in a single direction. This raises the same concerns associated with suppression of speech critical of government officials and administrations, concerns at the heart of the First Amendment. See, e.g., *Citizens United, supra*, 558 U.S. at 340. Because the accepted test for protection of core speech rights is not met, the Court's decision in *Abood* should be overruled.

Exclusive representation by unions in the private employment context or agency shops that require support from all employees in the private employment context—practices the *Abood* majority expressly relied on to support the assumption that public agency shops are consistent with First Amendment rules—do not provide an appropriate analogy for similar arrangements in government employment. The effects of an agency shop and risks to First Amendment values are strikingly different in the two settings.

More telling, patronage-based employment decisions in government employment—practices of which this Court has been openly skeptical because of their assumed tensions with First Amendment values, see, e.g., *Elrod v. Burns*, 427 U.S. 327 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); but see *Rutan v. Republican Party*, 497 U.S. 62, 92, 93-97 (1990) (Scalia, J., dissenting) (sharply criticizing the majority's skepticism about a historical practice that was widely accepted as legitimate at the time of the founding and for nearly two centuries following)—also do not present a suitable analogy. The ill-fit, however, is not because patronage-based employment is more problematic: the functions of agency shops in private employment and of patronage systems are distinguishable by virtue of characteristics that reduce the

impact of those practices on protected speech rights. Hence, even pure patronage employment practices are more consistent with First Amendment speech protection than the exclusive agency shop arrangements approved in *Abood*.

Moreover, the requirement that employees affirmatively object to speech expenditures creates impositions on First Amendment speech interests that cannot be justified as serving compelling state interests in a manner not capable of being served by less speech restrictive means. Opt-out requirements reinforce the problems that are created by the government agency shop.

ARGUMENT

I. Government Agency Shops Cannot Be Reconciled With Core First Amendment Protections.

The effects of government agency shops are clearly at odds with core First Amendment values. They cannot pass scrutiny under tests that this Court has used in a variety of other contexts to assess consistency with constitutional protections for freedom of speech. Indeed, government agency shops have effects far more pernicious than other practices that this Court has found constitutionally improper; this practice also lacks justifications that were available in settings where this Court has found constitutional violations.

A. The Core Protection of the First Amendment's Freedom of Speech Prevents Government Discrimination among Private Speakers' Messages Respecting Political Issues.

Although the First Amendment's prohibition on laws "abridging the freedom of speech" was not much discussed at the time of its adoption, it is plain that the concerns that animated that clause centered on use of government power to prefer speech favorable to one set of political interests or to inhibit speech in opposition. See, e.g., Cass, *Perils*, *supra* at 1443–47; William T. Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 Colum. L. Rev. 91 (1984); David Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795 (1985). The freedom of speech clause, like the rest of the Amendment and most of the Bill of Rights, was not a charter for social engineering to promote good speech or good outcomes on particular issues; nor was it designed as a primary safeguard for liberty—the structural provisions in the Constitution play that part. *See, e.g.*, The Federalist No. 51 (James Madison); Cass, *Perils, supra*. But the First Amendment's protection of the freedom of speech (like the other substantive protections in the Bill of Rights) provides a back-up against government actions that the founding generation saw as particularly likely and inimical to liberty. *See, e.g.*, Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 150–61, 447–53, 547–64 (1969).

Recognition of the limited, politically-oriented contemporaneous understanding of the meaning of "the freedom of speech" and the centrality of the

concept to democratic-republican governance provides essential background for interpretation of that clause. See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521 (1977); Cass, *Perils, supra*; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981). Appreciation of the First Amendment's special concern for freedom of political speech—speech about performance of politicians in public office, about political candidates and campaigns, and about issues of public debate respecting political choices—underlies much of this Court's First Amendment jurisprudence. See, e.g., *Citizens United, supra*, 558 U.S. at 328-36; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 768, 777 (1978) ("the free discussion of government affairs is the type of speech indispensable to decision making in a democracy"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (*Sullivan*).

Even decisions that have been criticized as discarding historical understanding of the limits of the First Amendment's protection of freedom of speech often have appealed to concerns with preserving freedom of political speech as the lodestar for ascertaining constitutional meaning. See, e.g., *Sullivan, supra*, 376 U.S. at 269-83; Ronald A. Cass, *Weighing Constitutional Anchors*: New York Times *Co. v. Sullivan and the Misdirection of First Amendment Doctrine*, 12 First Amend. L. Rev. 399 (2014)

(criticizing *Sullivan's* analysis respecting constitutional limits on libel law but applauding its appreciation of the centrality of protection against government suppression of political critique); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191 (1964) (celebrating the *Sullivan* decision for locating the core of freedom of speech analysis in protection against suppression of political critique).

Government actions that discriminate among political messages and speakers—that give favorable treatment to some or that impose penalties or burdens on others—pose the greatest threat to the values embraced in, and governance structures created by, the Constitution. For that reason, they are subject to the most searching analysis and bear the greatest burdens if government is to justify them as consistent with the First Amendment. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976). The Court recently stated the test this way:

> Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."

Citizens United, supra, 558 U.S. at 340, quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 454 (2007) (opinion of Roberts, C.J.) (*WRTL*). See also *Harris, supra*, 134 S. Ct. at 2639; *Knox, supra*, 132 S. Ct. at 2290-91.

As explained below, that is the standard that must be applied in this case; it is not a standard that the agency shop—in its basic concept as well as in its concrete application—can meet.

B. Agency Shops in Public Employment Conflict with the First Amendment.

1. Creation of Agency Shops Implicates Private Speech Messages, Not Government Speech or Speech Directly within the Scope of Employment.

Although the government enjoys considerable latitude when it acts in its capacity as employer—including latitude to command some speech and forbid other speech—it cannot violate core First Amendment protections. Government generally cannot impose limitations on speech that are unrelated to the performance of the relevant employment tasks. That is, however, what agency shops do.

Two different forms of government action are not at issue here. First, government can, among other things, instruct employees to disseminate certain messages that are deemed important to public health and welfare. For example, it can assign employees to create and publish messages promoting vaccination programs, urging purchases of government bonds, or counseling against littering or driving under the influence of alcohol. These tasks do not compel or forbid any private expression, instead constituting what has been termed "government speech." See, e.g., Steven Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565 (1980). While such speech may raise questions respecting the government's authority, it generally does not implicate First Amendment restraints. See generally Mark Yudof, When Government Speaks:

Politics, Law, and Government Expression in America (1983).

Second, apart from its role in promulgating government speech, government also enjoys leeway respecting speech by employees within the scope of their employment. So, for instance, a public school authority may tell public school teachers what subjects they must teach, what curriculum they must follow, and that they must devote class time to instruction that fits the curriculum, not to discussion of matters outside the curriculum that may be of interest to the teacher. The government may impose such limitations respecting speech, even speech that is itself protected in many other settings, when the limitations directly concern the employment tasks. Hence, it can restrict teachers' speech unrelated to the curriculum during class instruction time, whether the teachers want to use that time to praise the current government or to condemn it, or to advocate for or against policies associated with the party in power.

The issues involved in agency shop arrangements, however, implicate employees' *private* speech that is neither government speech—promulgating messages from government to others—nor employees' speech that is directly related to the performance of their employment duties (akin to what is said by them during in-class instruction). The question raised is whether forcing the individual employees to fund messages from the union (not the government) violates First Amendment strictures.

There is no question that payment of dues or of fees in lieu of dues requires some employees to pay for messages with which they disagree and that the messages at issue are not within the categories of messages associated with government speech or core

employment responsibilities. See, e.g., *Harris, supra*, 134 S. Ct. at 2643; *Knox, supra*, 132 S. Ct. at 2286-89; *Abood, supra*, 431 U.S. at 222-23. The union is a private entity selected from a set of other potential private entities to represent employees in bargaining.

In this context, it should be clear that the First Amendment—under any view of the clause respecting the freedom of speech—limits the government's authority to support some messages and to burden others. See, e.g., *Harris, supra*, 134 S. Ct. at 2639, 2642-43; *Knox, supra*, 132 S. Ct. at 2291; *Pickering, supra*, 391 U.S. at 573-74; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962). This Court's prior decisions establish that restrictions on speech expenditures or compulsion for speech expenditures are treated exactly the same as restraints on speech or compelled speech—understanding that expenditures provide the essential mechanisms for the vast spectrum of speech in the public domain. See, e.g., *Citizens United, supra*, 558 U.S. at 351; *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976). Moreover, the fact that the speech restriction burdens employment, rather than being a free-standing limitation on or compulsion of speech, does not remove the requirement of adherence to First Amendment strictures. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) (" 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected'," quoting with approval *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

The question, thus, is not whether there is a First Amendment problem with governmentally-sanctioned agency shops for public entities but whether any form of restriction on the operation of public agency shops can allow the institution to pass constitutional muster—or in the alternative, whether the very concept of agency shop arrangements for public employment is necessarily inconsistent with the First Amendment, given its compulsion of support for particular, private speech that lies outside the ambit clearly allowed for government.

2. Public Unions' Speech Cannot Be Divided into Speech about Political Issues and Speech about Labor Issues; Public Union Speech Routinely Implicates Political Issues.

The basic problem for addressing compelled support for union activity in public agencies is that the speech the union engages in—speech for which support is compelled under the agency shop arrangements approved in *Abood*—cannot be divided between speech that falls into the category of political speech protected at the core of the First Amendment and other speech that is farther from the core but essential to the union's activity.

The decision of the Court in *Abood* blithely asserts that freedom from compelled support of union speech can be separated between "expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment" (on the one hand), *Abood, supra*, 431 U.S. at 232, and "expenditures for political and ideological purposes unrelated to collective bargaining" (on the other hand), *id.*, at 236. As Justice Powell noted at the time, that

was an assumption certain to founder on its failure to own up to the similarity in the nature of the speech—and of the problems associated with compelled support for it—on both sides of the divide. See *Abood, supra*, 431 U.S. at 245 (Powell, J., concurring); see also *Harris, supra*, 134 S. Ct. at 2642.

As the majority of this Court observed in *Harris* and *Knox*, the central focus of union negotiation with the employing government are whether (and how much) to increase or decrease public employment, raise or lower wages and benefits for public employees, and reduce or increase the burdens born by public employees in carrying out their assigned tasks. See *Harris, supra*, 134 S. Ct. at 2642-43; *Knox, supra*, 132 S. Ct. at 2289. These subjects are implicated directly in intense argument about political decisions: about how to provide government services, which services to provide directly, how much of the government's budget to commit to public employees, and a series of other issues.

These matters are debated publicly by political candidates, political parties, and political officeholders, as well as by members of the public interested in issues of governance. See, e.g., *Harris, supra*, 134 S. Ct. at 2642-43; *Knox, supra*, 132 S. Ct. at 2289. Moreover, they cannot be separated from debate over which party or candidate should hold office, how well officeholders are performing their jobs, or other questions that are at the heart of our political order and at the core of speech protected by the First Amendment. As Justice Powell observed in his separate opinion in *Abood*:

> [T]here [is no] basis for distinguishing "collective-bargaining activities" from "political activities" so far as the interests protected by the First Amendment are concerned. Collective bargaining in the public sector is "political" in any meaningful sense of the word. Decisions on [even such "bread and butter" issues as wages, hours, vacations, and pensions] will have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates. Under our democratic system of government, decisions on these critical issues of public policy have been entrusted to elected officials who ultimately are responsible to the voters.

Abood, supra, 431 U.S. at 258-59 (Powell, J., concurring) (footnote omitted).

The tests that have been crafted by this Court from *Abood* on in its effort to distinguish speech for which non-union members can be charged from speech that falls outside that scope have not made meaningful distinctions among particular speech activities. See *Harris, supra*, 134 S. Ct. at 2642-43. Beyond the imprecision of the original *Abood* formulation, this Court has articulated other tests that similarly have failed to give clear direction to those who would apply them. See, e.g., *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 550, 557-58 (1991) (*Lehnert*) (opinion of Scalia, J.) (criticizing the *Lehnert* articulation of the test for separating permitted from prohibited speech support, especially the "germaneness" requirement, and noting the disagreement even within the *Lehnert* majority on how the test adopted in *Lehnert* would apply to funding particular activities).

While there have been more narrowly-crafted efforts to circumscribe the speech by unions in a public agency-shop for which subsidies from non-union members may be compelled, the basic problem remains: all of the union speech at issue in this context is speech that relates to political policy issues within the core of the First Amendment's concerns. The test for constitutionality of compelled support for any of this speech, thus, is one of strict scrutiny, as Justice Powell stated in *Abood* and this Court reaffirmed in *Harris* and *Knox*. See *Harris, supra*, 134 S. Ct. at 2642-43; *Knox, supra*, 132 S. Ct. at 2289-91; *Abood, supra*, 431 U.S. at 245 (Powell, J., concurring).

3. Compelled Support for Public Union Speech Predictably Favors Particular Messages and Viewpoints, Exacerbating Conflict with First Amendment Requirements.

The problem of compelled support for messages relating to issues in the domain of political policy debates, while serious under any assumed set of facts, is significantly more troubling when the support predictably favors one set of messages and viewpoints. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971). Viewpoint discrimination that promotes one message or burdens opposing messages in the political realm raises special concerns about government speech control. Justice Robert Jackson framed the point with customary eloquence, writing for the Court in *Board of Education v. Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

> politics, nationalism, religion, or other matters of opinion.

319 U.S. 624, 642 (1943) (*Barnette*).

The fact that makes agency shop arrangements in public employment so thoroughly inimical to First Amendment requirements is their almost inevitable creation and enforcement of just the orthodoxy Justice Jackson and this Court condemned in *Barnette*. Agency shops almost of necessity impose a burden on dissenting employees to support a *single viewpoint* on public policy issues *that cannot be expected to vary over time*. It is *not*, in other words, a situation in which one set of politically-fraught messages will receive support now and a different set later. Rather, the same set of messages will receive compelled support from dissenting employees at all times. That is both the predictable consequence and quite likely the intended design of agency shops in public employment—and the essence of a government-mandated orthodoxy.[2]

Unions representing public employees have an incentive to press for greater spending on those employees, higher wage and benefit packages, larger public payrolls, stronger protections against discipline or discharge, reduced burdens on public employees, and larger public budgets to cover the expenditures. The incentive of union leadership is to maximize

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[2] Although the focus of amicus in this brief is the abridgment of freedom of speech protected by the First Amendment, government imposition of required contributions to speech on political issues favoring one viewpoint, associated with one set of political candidates, and not likely to be altered as a result of competition among entities is inimical to broader liberty interests of association and democratic-republican political process. As noted, infra, this is in stark contrast to the history and operation of patronage systems in the United States.

benefits for the employees they represent. The union leadership does not have a direct interest in preserving a particular balance of taxing and spending for the relevant jurisdiction. It does not have a concern about preserving the competitiveness of the employing enterprise as it competes with enterprises producing similar products or services. There is no motivation for the leadership to help a larger entity (such as a political party, which competes in electoral markets) promote an image appealing to voters.

Other concerns may be pressed on union leadership in negotiation (formal or informal, during the time of express contract consideration or during other times when discussion might be thought to influence coming negotiations), but the leadership itself enjoys a relatively unalloyed interest in securing and expanding financial and other rewards for its members. The speech supported by the union and the agency shop structure, hence, will be speech promoting larger financial and related reward packages to public employees and also promoting the availability of public financing to pay for those packages. The incentives to union leadership cannot be expected to vary appreciably over time, and in that context, the messages that are at issue are not likely to change over time.

Given the constancy of the union's principal messages, financial support will have the predictable effect of using government agreement with a private entity to promote speech that consistently will favor one set of policy outcomes. Not coincidentally, it will also predictably favor one set of political enterprises and candidates for political office: those most inclined to support greater public spending on employees.

This one-sided support requirement—consistently favoring one viewpoint and one set of messages—makes the support requirement especially problematic; it reveals agency shop relationships as tantamount to government provision of subsidies for private speech promoting messages congenial to some officials and likely to serve their interests, regardless of the effect on broader public interests.

While courts do not sit in judgment on what is or is not beneficial to the public, they do enforce constitutional provisions intended to protect broader public interests against self-interested official actions that were thought most likely to reduce liberty in ways that would not be easily corrected by ordinary political processes. In this light, agency shops for public entities, just like the use of government processes to suppress speech critical of specific office-holders, should be seen as a sort of control over private speech that is most at odds with First Amendment values. See, e.g., *Sullivan, supra*, 376 U.S. at 271-74; Blasi, *supra*; Kalven, *supra*.

4. Government Approval of Agency Shops in Public Employment Fails Applicable First Amendment Tests.

The provision for government sanction of arrangements that require all employees to support speech by a private entity that does not represent their views on core political issues fails standard tests for consistency with the First Amendment's guarantee of the freedom of speech. The test adopted everywhere else for requirements that specially support some speech and specially burden opposing viewpoints expressly mandates that government bear the burden of showing a compelling interest that would not be

served by less speech restrictive means, see, e.g., *Harris, supra*, 134 S. Ct. at 2639; *Knox, supra*, 132 S. Ct. at 2290-91; *Citizens United, supra*, 558 U.S. at 340; *Federal Election Comm'n v. WRTL, supra*, 551 U.S. at 454 (opinion of Roberts, C.J.); *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976). Although the decisions that have upheld public agency shops have nominally accepted that standard, they have applied it in a manner that suggests a far more regulation-permissive test.

Abood, for example, did not critically examine the necessity for government to require all employees to support a single entity speaking on their behalf. After observing that public employment differs from other contexts because the employer is the government (and speech about this employer's operation, hence, is integrally bound up with matters of public affairs), see *Abood, supra*, 431 U.S. at 228-31, the opinion for the Court concludes that the question of support for activities of the representative in an agency shop is essentially the same as where private employment is involved. See *id., supra*, 431 U.S. at 231-32. Further, after stating that protection of political speech was "a central purpose of the First Amendment," *Abood* declared that there was nothing special about the label "political," saying that many other classes of speech are protected and that "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.*, 431 U.S. at 232.

Such breezy analogy to private employment has not been the path taken in other First Amendment inquiries. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 513-18 (1980); *Elrod v. Burns*, 427 U.S. 327, 355-72 (1976) (plurality opinion); *Pickering, supra*, 391 U.S. at 573-

74; *Keyishian v. Board of Regents*, 385 U.S. 589, 597-608 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962). In marked contrast to *Abood*, the tenor of this Court's First Amendment decisions, including those relating to claims by public employees, has been critical inquiry into the justifications offered and the extent of imposition on speech interests justified by them.

If that same scrutiny is extended to the agency shop setting, the justifications offered must be rejected as make-weights that come far short of sustaining the practice. First, the assertion that the practice is mandated by "labor peace" fails. Even if the concept is credited as an important goal—even a compelling public interest—labor peace does not depend on creation of an agency shop. It may be assisted by the absence of competition among unions for the right to represent employees in a public enterprise, but the requirement of *financial* support from dissenting employees makes no obvious contribution to that end.

Second, the remaining justification offered for agency shops, prevention of free-riding by some employees on the investment of others (to achieve higher wages and benefits, greater job security, and other advantages for the employees as a group), while logically connected to the agency shop, is insufficient. Dissenting employees may indeed benefit from some of the terms and conditions bargained for by the union and supported by employee expenditures, but the employees may nonetheless dissent because they find those benefits of less value than what is lost, for example in opportunity for individual distinction and reward.

Even crediting the free-riding concern on its own terms, the justification fails. The First Amendment protects speech precisely *because of* the generality of free-riding as it relates to speech. Speech is thought in many instances to constitute a public good, one that is at risk to threats of suppression, punishment, or other burdens because the speaker so often does not capture much of the public value of the speech. The speech categories that receive the greatest protection under the First Amendment are those for which the speakers tend to capture less of the public value of speech and which public officials predictably have greatest likelihood of special interest in suppressing or distorting. See, e.g., Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. Cin. L. Rev. 1317, 1352, 1364-73 (1988) (*Commercial Speech*); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554 (1991); Frederick Schauer, *Fear, Risk, and the First Amendment: Unravelling the "Chilling Effect,"* 58 B.U. L. Rev. 685 (1978). These are the categories of speech—and of speech regulation—that were thought to be most in need of special guardianship by the founding generation. See, e.g., Blasi, *Checking Value, supra*, at 535-38; Cass, *Perils*, supra, at 1449; Cass, *Commercial Speech, supra*, at 1352.

Abood and its progeny do not demand a clear, cogent reason for burdening speech that is at the core of First Amendment protections; they do not demand that the burdens be essential to the scope of the First Amendment imposition; they do not show appreciation of the one-sidedness of the speech constraint. Instead, these decisions allow government to require support for speech that predictably articulates one viewpoint on issues of immediate political controversy.

The limited protection that is accorded to dissenting employees against even broader infringement of their speech interests—the judicial construct that sets bounds around the requirement for speech support by dissenting employees—is left to unclear, unstructured, line-drawing tests, such as the "germaneness" of speech to the collective bargaining process. See, e.g., *Lehnert, supra*, 500 U.S. at 522-24. As *Lehnert* declares, that test does not require a close connection of the expenditures supported to any demonstrable benefit to the bargaining unit, *id.*, at 522-23; it expressly includes expenditures such as (a pro rata share of) the cost of conventions for organizations affiliated with the union representing the public employees, *id.*, at 522-30, but it would not include "a contribution by a local affiliate to its parent that is not part of the local's responsibilities as an affiliate," *id.*, at 524. It is hard to make the test comprehensible other than as a collection of loose guidelines and *ipse dixits*.

As a result, this test confers great discretion on the judges who must administer it and gives scant guidance to those who might be subject to sanctions for its violation or those whose rights are in the balance. As Justice Scalia observed of the test adopted in *Lehnert*:

> [I]f its application is to be believed, [the test] provides little if any guidance to the parties contemplating litigation, or to lower courts. It does not eliminate past confusion, but merely establishes new terminology to which, in the future, the confusion can be assigned.

Id., 500 U.S. at 551 (opinion of Scalia, J.). Such relatively unstructured judgment calls as *Abood* and *Lehnert* provide for comprise too slim a reed on which First Amendment protections will rest.

The decision in *Abood* surely was right that selection of an exclusive bargaining agent for public employees does not prevent individual employees from speaking out on issues with which they and the union representing them disagree. But compelling support for the union under an agency shop arrangement does require them to support speech with which they disagree; the speech cannot be separated into "ideological" political speech for which support should not be required and "non-ideological" or "other ideological" political speech for which compelled subsidies are permitted.

The compulsion for dissenting employees is entirely in one direction, respecting one set of messages. The arrangement is just like taxing expression of one viewpoint and subsidizing its opposite. That arrangement—not the selection of an exclusive bargaining representative—violates the First Amendment.

C. The First Amendment Problems Presented by Agency Shops in Public Employment Go Beyond any Problems Associated with Agency Shops in Private Employment or with Patronage Employment.

Although agency shop arrangements in public employment have been analogized to agency shops in private employment and to limitations on public employment associated with patronage systems, the agency shop for government employees interferes with First Amendment values much more than the

impositions on freedom of speech in either of these other settings.

1. First Amendment Effects of Agency Shops for Government Entities Are Not Analogous to Effects of Agency Shops for Private Employment.

Private agency shops, even when sanctioned by law, do not involve the same interference with political speech. See, e.g., *Harris, supra*, 134 S. Ct. at 2632-33. While the agency shop still provides line-drawing problems respecting the union speech activities that non-members may be required to support, the essential nature of the contract negotiation between union and employer is critically different. As even *Abood* recognized, decisions respecting how much private employers pay employees, how large a work-force they maintain, what limitations are placed on discipline or discharge, and a range of similar work-related matters do not implicate political debate. See, e.g., *Abood, supra*, 431 U.S. at 227-31; see also *Harris, supra*, 134 U.S. 2642-43; *Knox, supra*, 132 S. Ct. at 2289. That difference is crucial to application of First Amendment doctrine; after all, the prohibition on abridging the freedom of speech binds *government*, not private entities and the core speech concerns address *government* suppression of or compulsion of speech related to governance.

Even if the Court were unwilling, as the majority was in *Abood*, to take seriously that difference, the private firm setting also provides limitations on representatives' ability to press one set of viewpoints on employment questions. The threat of job losses may not induce all representatives to scale back their demands (made in public or private), but the need to

compete with other firms in the marketplace—including firms located outside the United States—limits employers' willingness to accede to such demands and at some level must also affect the representatives' willingness to advocate for actions that reduce the efficiency of employing firms. The absence of such countervailing considerations is part of what leads to the one-sided expression experienced in the public agency shop setting.[3]

2. Notable Express Limitations on Political Expression by Government Employees or Requirements of Support for Political Parties as Conditions of Employment Are Less at Odds with First Amendment Values than Public Agency Shops.

More significant than the differences with private employment contexts, the problems of speech compulsion endemic to public employment agency shops go beyond those associated with some notable steps that more directly address employees' political speech and association.

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[3] In theory, a version of the sort of competition experienced in the private sector does exist in government, at least if the governmental jurisdiction at issue is small enough. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956). Even then, however, the competition is a far different and much more attenuated version, as property investment reduces ease of moving from one jurisdiction to another and the functioning of any one government enterprise is merely part of a considerably larger bundle of goods and services that must be purchased jointly. See, e.g., Wallace E. Oates, *The Many Faces of the Tiebout Model*, in The Tiebout Model at Fifty 21, 27-31 (William Fischel ed. 2006).

One set of steps is contained in the Hatch Act, 53 Stat. 1147, codified at 5 U.S.C. § 7321 et seq., generally forbidding federal government employees from engaging in political activity of various sorts. Despite the obvious imposition on speech freedom, this Court upheld the act against constitutional challenge. See *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (*Letter Carriers*). One of the pivotal considerations in that decision was the even-handedness of the restriction on political activity:

> The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or point of view, but apply equally to all partisan activities of the type described. Nor do they seek to control political opinions or beliefs

Id., at 564. The absence of discrimination found in the structure and administration of the act persuaded the *Letter Carriers* Court that the limitation on political activity furthered efficient execution of the laws without tilting speech or political processes toward any preferred outcome. *Id.*, at 564-67. That judgment of even-handedness stands in stark contrast to the predictable operation of an agency shop to promote only one set of messages and one viewpoint on important political subjects.

Members of this Court have at times noted the similarity between agency shops for public employment, where employees must support messages of the representing union, and patronage systems, where employees must belong to, work for, or endorse a political party (and by extension its political messages). See, e.g., *Abood, supra*, 431 U.S. at 242-44 (Rehnquist, J., concurring); *id.*, at

260 n.14 (Powell, J., dissenting). The analogy is a fair one so far as it suggests that both settings involve a government decision to restrict employment to individuals who are willing to support certain political messages.

Yet the problems this Court has found in cases presenting issues attached to patronage-based decisions are in fact far worse in agency shop settings. Critically, the even-handedness that was so important to the decision in *Letter Carriers* is far more likely to obtain in patronage systems. Although the incumbent administration inevitably favors one set of political messages and associations, this is not likely to be maintained over time. The nature of competition for political offices that depend on patronage includes the investment of two opposing parties in contesting for control of the levers of power that permit disposition of offices to supporters.

That competition makes for a greater likelihood of even-handedness over time, a point made by Justice Powell in *Elrod v. Burns*, 427 U.S. 327, 387-88 (1976) (Powell, J., dissenting) (party discipline and patronage employment practices jointly support more vigorous political competition). This point was at the heart of Justice Powell's observation that the *Elrod* plaintiffs were previously beneficiaries of patronage hiring. *Id.*, at 380 (Powell, J., dissenting).

The same point also was made by Justice Scalia in *Rutan v. Republican Party*, 497 U.S. 62, 92, 93-97 (1990) (Scalia, J., dissenting), defending the legitimacy of patronage employment practices as fair to both sides (each party trying to promote its own messages through political competition that includes patronage), as not predictably favoring one set of messages, as rooted in historically accepted practices,

and as consistent with the continued disposition of important offices, including federal judgeships. In other words, patronage employment practices are (over time) consistent with heterodoxy, not a rigid orthodoxy, in the political speech they support.

As explained above, that is the exact opposite of the situation with agency shops in public enterprises. Thus, agency shops are problematic even if patronage practices are not; and, as Justices Rehnquist and Powell observed in *Abood*, if patronage practices are found constitutionally wanting, that judgment should be dispositive of the unconstitutionality of public agency shops.

II. Requiring Dissenting Public Employees to Bear the Burden of Opting-Out from Support of Objectionable Political Speech Is Inconsistent with the First Amendment.

The burden that agency shops present cannot be squared with even a modest view of First Amendment limitations, but if the Court were to reach a different decision on that question it should be clear to all that imposition of an opt-out requirement for dissenting employees is not consistent with the Constitution. This Court, going back to *Abood*, recognized that dissenting employees' First Amendment interests are at stake in the decision to compel support for speech with which they disagree. See *Abood, supra*, 431 U.S. at 234-35. That understanding has been reaffirmed repeatedly. See, e.g., *Harris, supra*, 134 S. Ct. at 2632-33, 2639; *Knox, supra*, 132 S. Ct. at 2289; *Lehnert, supra*, 500 U.S. at 522. As Justice Powell noted, dissenting in *Abood*:

> Under First Amendment principles ., it is now clear, first, that any withholding of financial support for a public-sector union is within the protection of the First Amendment; and, second, that the State should bear the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests.

Abood, supra, 431 U.S. at 255 (Powell, J., dissenting). This Court more recently has observed that this burden is heavier than acknowledged, requiring timely objection, specific articulation of the basis for finding particular speech outside the sphere that quite imprecise tests such as that adopted in *Lehnert* use to divide permitted from prohibited expenditures, and often considerable resources to pursue challenges. See, e.g., *Harris, supra*, 134 S. Ct. at 2633; *Knox, supra*, 132 S. Ct. at 2294.

The government generally cannot place the burden of self-protection on those whose First Amendment rights are at issue. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1 (1949). That is especially true where there is reason to expect that official decisions will be tainted with self-interest that is served by burdens on particular speech viewpoints. See, e.g., *Pickering, supra*, 391 U.S. at 573-75; *Sullivan, supra*.

Justifications of supposed efficiency, while availing in settings where there is less interference with constitutional rights or structure and less reason for skepticism of official self-interest, see, e.g., *Enquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008) (dealing with issues of ordinary, individual claims respecting adverse employment actions), do not provide sufficient reason to support abridgement of

constitutional commands in settings such as this. As the Court has said in another context:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government

INS v. Chadha, 462 U.S. 919, 944 (1983).

Given the clear infringement of speech rights worked by agency shops in public employment, imposing a further burden on dissenting employees cannot be justified as necessary to further a compelling public need.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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